significant intrusion into the private affairs of the person who is the subject to the profiling. Expanding the permissible uses of this information to include marketing (as opposed to just technical processing and billing) would create new points of exposure and erode consumers' ability to control what information is revealed about them, and potentially chill their use of the telephone to speak to and associate with others.

96 We believe our protection of call detail is necessary for the protection of values that have long been established in Washington statutes and constitutional law. We find that Washington citizens have a right to expect greater protection of information about their communications over the telephone than the FCC's rules afford. By carefully tailoring our strongest protections for this sensitive information, we believe we have also met the requirement of federal statutes and the constitution.

D. We adopt opt-in for disclosure of individually identifiable CPNI outside the company.

97 Like the FCC, we are adopting rules that require telecommunications companies to obtain express (opt-in) approval before the companies may disclose any non-public information about customers to unrelated third parties. This requirement is represented by the dark-shaded, upper portion of the box in Table 1. We have chosen, however, to define "third parties" more broadly (and thus the corporate "family" more narrowly) than the FCC. In our view, the FCC's inclusion of "affiliates," "independent contractors" and "joint venture partners" as part of the corporate family is overly broad, and the definition of joint venture partners is vague as well as broad. Also, we are not confident that companies will have adequate incentive to enforce the contracts that the FCC's rules require for the protection of CPNI in the hands of those affiliates and joint venture partners. The effect of our rule is to make disclosure to more kinds of companies subject to opt-in.

98 Although we emphasize in this order the special sensitivity of call detail information, we do not mean to suggest that individually identifiable CPNI other than call detail information does not need protection. For example, we think most customers would consider it a potentially serious invasion of their privacy for the phone company to sell a list of the telecommunications services the customer purchases, including the amount the customer spends each

month on those services, to any third party rhat would be willing to pay for the information. For many business customers, for example, this is commercially sensitive information We therefore require opt-in approval before companies may disclose individually identifiable CPNI (including non-call-detail CPNI) to outside parties.

YY Consequently, our rules limit disclosure of private account informadon under the opt-out schcmc to entities under common control with the rclccommunications company thar holds the information. We did not follow the FCC and permit access by "joint venture partners" to information that is subject only to the opt-out scheme, because that is a category that can fit any cntiry that uses information to market communications-related services. As a category, "joint venrurcrs" is useless because it permits inclusion of every firm and excludes no firm. We find that such potentially broad disclosure, without express consent, is inconsistent with reasonable customer privacy expectations and we find little support in the *U. S. West* decision, or elsewhere, for the proposition that companies have a core commercial speech interest in selling such information to third parties.'"

E. We adopt opt-out for in-company use of (non-call-detail) private account information for the purpose of marketing services that are not within the same category of service to which the customer already subscribes.

100 In our rules we define "private account information" as the subset of CPNI that does not include call detail but is associated with an identifiable individual. A company ma): rely on an opt-out notice when it proposes to use the customer's private account information for its own marketing purposes (as opposed to selling the information or disclosing it outside of the company, which requires opr-in approval). This category is represented by the medium-shaded middle-left part of the box in Table 1.

101 Because the opt-out method, even with the improvements we are adopting, is still likely to be misunderstood or go unnoticed by at least some customers, **we**

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[50] *See Trans Union Corp. v. Federal Trade Comm'n.*, 245 F.3d *809* (U.S.App. D.C. 2001), *cert den.* 122 S.Ct. 2386 (June 2002) (upholding rules adopted by Federal Trade Commission banning the sale ofmailing lists by credit reponing agencies containing the names of consumers who met certain criteria. such as possession of an auto loan, a department store credit card, or two or more mortgages).

reserve its application to circumstances in which a failure to obtain informed consent is less serious and in which we find that most customers do not have a strong objection. For example, a company need only provide notice and an opportunity to opt-out before it may compile a targeted marketing list, for its own use, of its interexchange customers whose toll charges exceed a given amount per month.[51]

102 Aside from our opt-in restriction on call detail, our requirement of notice and an opportunity to opt-out for in-company use of private account information parallels the FCC's opt-out requirements, which the FCC arrived at based on section 222 and the record before it. As such, we see value in adhering to the general framework of the FCC's CPNI rules, when consistent with our own findings and record.[52]

103 Additionally, it is clear that in overturning the FCC's prior rules, the 10th Circuit was specifically concerned with restrictions on carrier speech that solicits a commercial transaction with the carrier's own customers and on speech within a company (including among affiliates) that facilitates that commercial solicitation. *U.S. West, 182 F.3d at 1233, fn. 4.* In such instances, *and* where concerns for the customers' privacy are less grave, it follows that our rules should have a lighter touch, though still preserving customers' opportunity to control the use of their private information.

F. We do not require notice to customers before a company may use (non-call-detail) private account information to market services within the same category to which the customer already subscribes.

104 Although we restrict access to call detail information for any purpose absent the customer's opt-in approval, we otherwise mirror the FCC rules in that no

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[51] This example assumes the company's purpose in collecting such information would be to market, to its customers, services that are outside the category of service to which the customer subscribes. As with the FCC's rules, if the purpose of the list were to enable the company to market additional services in the same category to which the customer already subscribes, no opt-out "approval" would be required. *See section F, infra.*

[52] Our rule for inbound and outbound telemarketing is very similar to the FCC's. Carriers may use oral notice to obtain limited, one-time use of CPNI for inbound and outbound customer telephone contacts for the duration of the call. Because it is oral notice, it requires an express (opt-in) response during the telemarketing call, and as a result a company that uses only private account information in telemarketing will nevertheless have secured opt-in approval for that use.

notice is required for a carrier to use private account information (which is defined to exclude call detail) to market new services within the same category of service to which the customer already subscribes." This allowance is reflected by the white, lower left-hand corner of the box in Table 1, and was present in the prior federal rules, and in our srate's rules. We do not, for example, place any restriction on a company's ability to use private account information to market call-waiting services to customers who subscribe to local exchange service but who do not already purchase call-waiting. We find that consumers would not consider it an invasion of their privacy if their own telccommunicauons provider observes the services they purchase (as distinct from observing, on anything more than a general level, what use they make of those services) and from that observation makes offers of related services. With the added protection our rules afford call detd information, we arc confident that a company's use of information about its customers' prior purchases to target its promotion of related services does not upset customers' privacy expectations. Indeed, this is the type of use that is not restricted in othrr industries, and is typical of a customer-company relationship. We follow the FCC on this point.

CONCLUSION

105 We have sought to develop rules that are consistent with Section 222 and the FCC's rules interpreting that statute as well as with the U.S. Constitution and our laws and constitution. While we respect the FCC's approach we nonetheless reach a different conclusion on how to harmonize these laws and the interests they protect.''

106 We find that the FCC's rules leave certain substantial privacy, speech, and association interests inadequately protected in our state. As the FCC expressly

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"The FCC reasoned that a company's use of CPNI to market services closely related to the those the customer already purchases is an area in which there truly is implied consent on the pan of the customer. and that. in section 222 "Congress intended that a carrier could use CPNI without customer approval, but could only do so depending on the service(s) to which the customer subscribes."

"Our dissenting colleague has reached a third conclusion — that no CPNI may be disclosed without express consent. We note that his interpretation is even stricter than what was required under our old rules. or under the earlier federal rules, which did nor. as the dissent would, require express consent to use CPNI to market even within the same category ofservices. Also. we feel an obligation to try to harmonize the federal statute with other laws. decisions. and principles, as has the FCC. albeit with a different result. Finally. it is true that the approach Commissioner Hemstad proposes would not be as complex as the one we adopt. Complexity. however. is the price we pay for the complex balancing of the interests at issue.

allowed for in its order, we are adopting rules that are more stringent, in certain respects, than those of the FCC. While our rules follow the framework of the FCC rules, our record supports our adoption of more-stringent protections in three important respects: (1) We provide increased protection for particularly sensitive personal information, including the phone numbers a customer calls and including highly specific phone calling habits of the customer. A company may not use this information, known as "call detail," without the customer's express ("opt-in") approval, except as necessary for the company to provide service or as required by law. (2) We narrow the scope of a telecommunications company's "family" of affiliated companies, within which it may share information about a customer if the customer does not "opt-out" The effect is to require express ("opt-in"? approval for disclosure to more types of entities than the federal rules require. (3) We improve the requirements for the notice that companies must provide customers, to help customers understand what is at stake. Also, by requiring companies to offer their customers more convenient methods for opting-out, we enhance customers' ability to exercise that choice, where applicable.

ORDER

107 THE COMMISSION ORDERS:

108 WAC sections 480-120-144, 480-120-151, 480-120-152, 480-120-153, 480-120-154 are repealed.

WAC sections 480-120-201, 480-120-203, 480-120-204, 480-120-205, 480-120-206, 480-120-207, 480-120-208, 480-120-209,480-120-211,480-120-212,480-120-213, 480-120-214,480-120-215, 480-120-216, 480-120-217, 480-120-218, and 480-120-219 are adopted to read as set forth in Appendix C, as rules of the Washington Utilities and Transportation Commission, to take effect pursuant to RCW 34.05.380 (2) on January 1, 2003.

109 This Order and the rule set out below, after being recorded in the register of the Washington Utilities and Transportation Commission, shall be forwarded to the Code Reviser for filing pursuant to chapters 80.01 and 34.05 RCW and chapter 1-21 WAC.

DATED at Olympia, Washington, this 7th day of November, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

PATRICK J. OSHIE, Commissioner

Commissioner RICHARD HEMSTAD, dissenting:

110 With this Order, my colleagues have done a commendable job of constructing rules that attempt a balance between customer privacy interests and the commercial inrerests of relecommunications companies. However, the end result is a remarkably complex set of rules which classify customer consent for the use of individually identifiable customer proprietary information in some circumsrances by affirmative approval (opr-in), in other circumstances by silence (opt-out), or in still other circumstances by assumed approval with no opportunity even to opt out.

111 While these dense rules will be daunting for the affected companies to internalize and implement, they will surely be incomprehensible to even well-informed customers. In contrast, the directive from Congress to this Commission in 47 U.S.C. Sec. 222 is simple and easily understood: Customer approval is required before a telecommunications company may use, disclose or access individually identifiable customer proprietary information except *to* the extent necessary to operate the public switched telephone network and related activities (e.g., billing). The statute, I believe, can only be fairly read to require the *affirmative* consent of the customer. Consequently, I cannot join in the adoption of these rules concerning customer privacy.

The constitutionality of 47 U.S.C. § 222 has never been challenged and we cannot act as if it is unconstitutional.

112 No one has challenged the constitutionality of 47 U.S.C. § 222. It was nor challenged in the 10th Circuit, and none of the comments we havc received have contended it is unconstitutional. A sratutc is presumed constitutional until it has been determined to be otherwise. We cannot act as if the federal law is unconstitutional and give ourselves permission to invent orhcr ways of treating customer proprietary network information that arc inconsistent with rhc statute. What is adopted today in the sections that do not permit any customer control, and those that permit so-called approval through an opr-out scheme, arc, in my opinion, in contlict with the clear, unambiguous grant by Congress to customers of control of the confidentiality of their proprietary nenvork information.

Congress made a clear statement that individually identifiable customer proprietary network information may not be used without first obtaining approval of the customer.

113 The language of the sratute is unambiguous:

> **(c) CONFIDENTIALITY OF CUSTOMER PROPRIETARY NETWORK INFORMATION.—**
>
> **(1) PRIVACY REQUIREMENTS FOR TELECOMMUNICATIONSCARRIERS.**—Except as required by law or *with the approval of the customer*, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access *to* individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

47 U.S.C. 222(c)(1) (Italics added)

Use of customer information without notice to customers and without even the possibili of disapproval is directly contrary to the statute.

114 As stated above, Sec. 222 requires "approval of the customer" before any use, disclosure, or access to individually identifiable customer proprietary network information. The rules adopted today in some circumstances allow rclecommunications companies, and any company thar controls, is controlled by, or is under common control with a telecommunications company, to use certain customer information *without notice to customers and without* their *approval*, not even so-called opt out approval. This is an effort, as I understand it, to make the rules acceptable under a *Central Hudson*[55] analysis. Accepting *Central Hudson* as the correct precedent to follow is, in my opinion, a mistake on at least three counts.

115 First, *Central Hudson* is a case that did not interpret an explicit federal statutory directive. We should not ignore the fact rhat Congress has spoken and, in adopting Sec. 222, must be presumed to havc weighed the competing values of commercial speech and personal privacy.

116 Second, *Central Hudson's* facts did not involve the use or disclosure of personal information. Rather, it involved an entirely different fact-situation: a utility stuffing, with its monthly bill, a generic advertisement to promote energy consumption in a time of shortage.

117 Thud, *Central Hudson* addressed only one constitutional issue, the commercial speech rights of a utility to advertise its product free from interference by a regulatory agency. Nothing in the case even remotely touched on what I believe to be constitutionally implicated privacy interests" of customers in the confidentiality of their discrete customer information.

118 While the FCC may be required to respond to the remand directives of the 10th Circuit's majority opinion," which arrived at its procedural conclusion based upon *Central Hudson,* this Commission is not bound by the 10th Circuit's decision or by its reliance on a case rhat did not concern a congressional act,

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[55] *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N. Y.*, 447 U.S. 557, 564-65 (1980)(setting out the test to be applied in determining whether restrictions on commercial speech survive "intermediate scrutiny")

[56] In discussing privacy, I am referencing customers' rights to privacy. free speech and free association.

[57] The minority opinion. I believe, is the correct view and is true to the language and purpose of Sec. 222.

had completely inapposite facts, and did not address the constitutionally implicated interests that motivated the Commission's departure from the FCC in rhc first place.[58]

Approval is not the absence of disapproval, which is all that is represented by opt- out schemes,

119 Other portions of the rules adopted today permit company use of confidential customer information unless the customer opts not to permit such usage. Only the self-interested commenters in this rulemaking promote the view that Congress meant approval to mean the absence of disapproval. It is not a reasonable conclusion; and it is not a conclusion that is permitted in the absence of ambiguity. The proponents of the view that "approval" means an opportunity to opt out rely on wishful thinking, not ambiguity, when they claim it is a reasonable interpretation of the statute.

120 Congress constructed a section of law that has as its unmistakable aim the protccuon of the confidentiality of customer information and it placed the customer in charge of that confidentiality, nor telecommunications companies and not regulatory agencies.

121 Congress could have been silent on the topic of customer proprietary network information. Then at least an arguable conclusion might be that the information obtained by telecommunications carriers could be treated the same as the information obtained by any other business nor the subject of a particular federal stature respecting customer information. Because Congress was not silent. we cannot act as if it were.

122 Or, Congress could have constructed a statute like those that are particular to certain activities (e.g., educational and financial institutions, video rental companies) and provided some specific scheme for how the use and disclosure of customer information would be treated. With respect to financial institutions and disclosure of customer information, Congress explicitly used the term "opt out." 15 U.S.C. § 6802(b). When Congress wants to prescribe an opr-out scheme related to customer information, it does so explicitly. Rut Congress did not prescribe in Sec. 222 the schemes used in other statutes; we

[58] Access to information permitted to companies without either customer notice or approval also raises troubling issues of unfair competitive advantage far those companies vis-a-vis their competitors.

cannot act as if it did. Customer information obtained by telecommunications carriers must be treated differently from information obtained by other businesses subject to other, specific statutes adopted by Congress to regulate the use and disclosure of customer information.

123 We can only treat telecommunicarions customer proprietary information as prescribed in 47 U.S.C. § 222. There is no ambiguity. Congress could have said nothing, or prescribed some other means of safeguarding this information if that is what it had wanted to do. Specifically, it could have created an opr out scheme, but it clearly and unambiguously did not. Instead of silence, an opt out scheme, or something else, it said "with approval of the customer." A fair reading of the statute compels the conclusion that "approval" can mean only an affirmative statement by a customer, not an assumption of approval based on the absence of disapproval.

Proponents claim opt out schemes are more efficient and that those who wish to keep their proprietary information private can do so.

124 If rhe value sought to be served is efficiency rather than protection of privacy, then proponents probably are correct that use of an opt out scheme would require less effort from telecommunicauons carriers and only some effort from cusromers thar choose to opt our. However, Congress was in a position to give relative weight to these values—efficiency and personal privacy—and it did so in the language of Sec. 222. It chose efficiency when it did not require customer approval for use of personal information in order to conduct everyday operations of the network, bur it also chose to value personal privacy by requiring customer approval of any other use of personal informadon.

Washington State Dolicv on privacy is consistent with and reinforces Sec. 222.

125 Congress has made a determination that telecommunications carriers must protect the confidentiality of customer proprietary network information and must have customer approval to use that information. That is consistent with and reinforced by the strong statement in favor of personal privacy found at Article I, Section 7, of our own Washington Constitution. The adoption of rules that permit use of protected information either without notice or with an opt out scheme is inconsistent with state policy on personal privacy.

Concluding Comments

126 In footnote 54 of the Commission's Order, my colleagues respond to this dissent by asserting that "Complexity...is the price we pay for the complex balancing of interests at issue". But Congress in the unambiguous directive of Sec. 222 did not choose complexity. It chose simplicity. In doing so it mirrored the emphatic views of a broad spectrum of consumers as demonstrated in the enormous outpouring of surprise, anger and distress of Qwest's customers when they became aware of Qwest's intentions to access without their approval what they had assumed to be private information.[59] The Commission's Order, with its complexities, neither responds to these legitimate consumer concerns nor to Sec. 222.

127 My colleagues are motivated by considerable concern for customer privacy, which I applaud. That concern is amply demonstrated by their elaborate and scholarly Order. But I nonetheless believe the Commission has followed the wrong case to the wrong result and, in doing so, has ignored the explicit directive of Congress. In an age when huge amounts of personal information can be collected and manipulated, it is my hope that these rules will some day be reviewed by a court that recognizes that the concerns of individuals for their privacy pose new fact-situations that require a fresh analysis. A new precedent for a new environment is in order, one that recognizes the vast changes in technology and its impact on our private lives in the nventy-nvo years since *Central Hudson.*

128 Accordingly, I cannot join in adoption of rules that ignore a customer's statutory right to confidentiality unless the customer gives affirmative approval to a telecommunications company to use, disclose, or access individually identifiable customer proprietary network information.

129 For these reasons, I respectfully dissent.

RICHARD HEMSTAD, Commissioner

[59] See the description beginning at ¶ 76 of the Order

Note: The following is added at Code Reviser request for statistical purposes:

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, amended 0, repealed 0; Federal Rules or Standards: New 0, amended 0, repealed 0; or Recently Enacted State Statutes: New 0, amended 0, repealed *0*.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 14, amended 0, repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 3, amended 0, repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, amended 0, repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, amended 0, repealed 0; Pilot Rule Making: New 0, amended 0, repealed 0; or Other Alternative Rule Making: New 0, amended 0, repealed 0.

APPENDIX A

Docket No. UT-990146

Response to Specific Comments

1 In this appendix the Commission responds to comments made on the proposed rules. We received hundreds of pages of comments, most concerning the choice between opt-in approval and opt-out approval. The appropriate approval mechanism and the legal basis for our choices are addressed at length in the body of the adoption order. In this appendix the Commission responds to the other substantive comments.

The Commission received comments from several telecommunications companies, consumer advocates, and others, including AARP, AT&T, Allegiance Telecom, Claudia Berry, Elizabeth Clawson, Rep. Mary Lou Dickerson, Electronic Privacy Information Center (EPIC), Elizabeth Fehrenback, Emeri Hansen, Gail Love, Low Income Telecommunications Project (LITE),Lindsay Olsen, Public Counsel Section of the Office of Attorney General, Qwest, Senior Services, Sprint, Robert Stein, Matilda Stubbs, Desinee Sutton, Ben Unger, Verizon, WashPIRG, Washington Independent Telephone Association (WITA), and WorldCom.

3 The material is organized by subject and by rule number, which is noted at the end of each response. In each response we indicate whether we made a change in the adopted rules based upon the comment, or whether we adhered to the language in the proposed rule.

4 **Definition of customer network proprietary network information (CPNI):** The definition of CPNI in the proposed rules contained the phrase "which includes information obtained by the company for the provision of telecommunications service." The consumer advocates considered the phrase to be ambiguous and perhaps providing permission for companies to use, disclose, or permit access to such information as medical status submitted by a customer in compliance with proposed WAC 480-120-173 with no more than opt-out approval. In order to remove the ambiguity, we removed the phrase from the adopted rules. The remaining definition of CPNI in subsections (a) and (b) came directly from the federal statute. However, because the Commission proposes specific, more stringent protections for those portions of CPNI that are individually identifiable, we have added to the definition of

CPNI a description of the subsets of data contained within thar broader category of data. *See WAC 480-120-201.*

Interference wfth Marketing "Friends and Family" Type Plans: Some companies provide reduced roll rates to customers who call other customers who use the company's service. Company commcnrs suggest thar our definition of call detail would restrict marketing these programs. It is true rhat under our rules a company may nor examine numbers called to determine if a particular customer routinely calls another customer and use that information to suggest to the cusromcr a change of long-distance plans. The examination of such information for that purpose would stray into a practice that we havc determined could result in revealing sensitive communications habits and personal habits. Once a customer elects "Friends and Family" service, the company can of course use specific call detail information in order to initiate, render, coordinate, facilitate, bill, and collect for telecommunications services the customer has purchased or requested. *See WAC 480-120-201 and 205.*

6 **Suggested Changes to Definition of Call Detail:** Companies suggested elimination of subsections (b) and (c) in the definition of call detail, and asked for clarification of the scope of (d). Subsection (b) defines as call detail information associating individual customers with specific area codes, prefixes, or complete telephone numbers correlated with the time of day, length of call and cost of call. Elimination of this subsection would mean that companies could, without opt-in approval, examine customers' communicarions habits and know or deduce a great deal about customers' personal habits or circumstances (e.g., determine a customer makes routine calls to Alcoholics Anonymous). Elimination of this subsection would undo one of the most important protections we seck to achieve with these rules.

7 Elimination of subsection (c) would permit companies and others into whose hands the information falls to discern calling patterns that may also reveal sensitive personal habits. While we exclude from call detail general calling patterns and expenses when expressed in terms of one month or more of activity or expense, we consider that information to be call detail when viewed for shorter periods.

8 We revised subsection (d) so it is clear that it refers only *to* information that is associated with a specific individual. *See WAC 480-120-201.*

9 **Prohibi se of CPNI Except as Permitted by 47 U.S.C. § 222 or By These Rules:** Our proposed rules permit the use of CPNI in accordance with federal law except when these rules require otherwise. Consumers suggested that this should be changed so that no use is permitted unless authorized by federal law or these rules. The purpose would be to emphasize that that CPNI is the property of customers and that it can only be used when there is specific permission granted. We reviewed the rule with these comments in mind and determined the rule is unnecessary and it has been withdrawn.

N **Oral Approval for Use of CPNI:** Companies expressed concern that our rules permitting oral opt-in approval for use of CPNI and call detail are inconsistent with federal requirements. The concern is that our rule permitting third-party verification similar to that used to verify customer changes from one long distance provider to another cannot be used while the customer is on the line with the company representative. The underlying concern appears to be that a competitor could nor look at certain account information in the process of completing a new service order for a customer who is switching from another carrier.

11 Our adopted rules address these concerns in a variety of ways. First, no approval is required to use CPNI to initiate, render, coordinate, facilitate, bill, and collect for telecommunications services the customer has purchased or requested. This has not changed from the proposed rules.

12 Second, we permit the use of CPNI for the duration of inbound and outbound telemarketing calls without third-party verification of approval. We do not require a safeguard in these circumstances because rhe customer may simply hang up.

13 Third, where we do require third-party verification, we have added an option in the adopted rules that was not in the proposed rules. If a company requests opt-in approval for use of call detail beyond the duration of the call, it may use third-party verification process that is similar to that used for third-party verification when customers switch long-distance providers, or it map make a sound recording of the oral approval sufficient to establish knowing approval. The inclusion of making a sound recording as an option is a change from the proposed rules. (Note that Washington is a two-party consent state with

rcspcct to recording conversations, so a company using this method to obtain oral approval will have to inform the customer that the call will be recorded.) *See WAC 480-120-205, 206, and 212.*

14 **Use of CPNI During Inbound and Outbound Telemarketing Calls:** In our proposed draft we permitted use of private account information after oral noucc and oral approval during an inbound telcmarkcting call. After consideration of company comments concerning customers' desires to receive a quick response when discussing telecommunications services with a company that is already providing scrvicc, we dctcrmincd that a rule concerning inbound telemarketing alone was insufficient to lead to responsive service. In the adopted rules we permit use of CPNI during outbound as well as inbound tclcmarkcting calls, provided thcrc is notice and the customer approves of the use of CPNI. In both instances, the approval and use are permitted only for the durauon of the call, which provides a privacy safeguard for customers that balances company access to CPNI during outbound telemarketing calls. *See WAC 480-120-206.*

15 **Restriction on the Use of Call Detail Will Require Companies to Stop Some Marketing Practices:** Some companies stated that certain of their current marketing practices would be prohibited by the proposed rule. For example, using CPNI to market caller idendficadon, Digital Subscriber Line (DSL) service, voice mail, and second residential lines. Most of the examples given are related to services already provided to a customer, because they only work with local service. We addressed this concern in the adopted rules with an additional rule that permits use of private account information without either notice or approval to market services related to those already provided by a company.

16 Other services, such as DSL, could be marketed to customers that are not local service customers, in which case a company would either have no CPNI related to the person because the person is not a customer, or would have to have opt-out or opt-in approval, depending on whether the company planned to use private account information or call detail to market the service. (Note that advertising and marketing based on information that does not come from CPNI may be used without any approval.) *See WAC 480-120-208.*

17 **Notice Issues:** We received many comments on noucc, some general in nature and others specific to various subsections.

- **Notice Generally:** In general, companies suggested the amount and types of notice would be confusing, and consumer advocates did nor question the amount and type of notice. Our response to the general concern thar thcrc is too much notice required is that we have a record that demonstrates rhar customcrs have expressed more inrcrcst in privacy of telecommunications records than any other policy issue to come before the Commission. We believe that customers genuinely care abour their privacy, rhat privacy is an interest that should be protected, and thar customers will not be confused by information that enables rhcm to make an informed decision. We have tried to develop notice requirements that will enable cusromers to make informed choices and that do not contain unnecessary provisions. *WAC 480-120-209.*

- **Annual Notice:** We received several company commenrs suggesting we follow the Federal Communications Commission (FCC) and reduce the required frequency of opt-out notice from one year to every two years. The issue is whether customers need notice more or less ofren in order to be sure they understand their options and how to exercise them. We are persuaded that with the substantial notice required and the multiple mechanisms fur opting out, customers will receive notices that can be read and understood and thar the process of opting out will be easy. For these reasons, we believe thar less frequent notice will not reduce customer understanding or the opportunity to opt out. We also see a value in reducing the cost to notify customers. We have changed opt-out notice requirement to once every two years. *See WAC 480-120-209(2).*

- **Inclusion of Notice with Other Advertising or Promotional Material:** Our proposed rule contained a prohibition against providing the opt-our nonce with any other advertising or promotional material; it did permit inclusion of the nonce with customer bills. Companies commented that it would be beneficial to companies to be permitted to place both advertising and opt-out notices together in bills because placing advertising in bill envelopes is cost-effective. We do not doubt chat it would be cost-effective for companies to include advertising with the notice, but the efficiency in advertising costs may come at the

expense of the effectiveness of the notice because it could be lost in the advertising and other material. We have not changed this requirement in our adopted rules. *WAC 480-120-209(3).*

- **A Mix of Opt-In and Opt-Out Approval Will Cause Customer Confusion:** Companies and consumers arc united in believing that customers will be confused if call detail *is* made available only after opt-in approval is given, and private account informarion is available to companies after notice and an opportunity to opr-our. The argument appears to be that two possibilities is one too many. We disagree. First, not all companies will send both types of notice. Some may elect not to **ask** for opt-in or opt-out approval. Others may request one or the other, or use a single opt-in notice for all CPNI. Second, if both notices arc sent, we think customers and companies alike can understand two sets of information and two types of approval.

  We believe that confusion *is* unlikely if companies provide accurate notices to customers. It is not difficult to understand the difference between using, disclosing, and permitring access to information about services purchased (e.g., a second line) and call detail (e.g., whom you call and who calls you). Companies have an incentive to provide correct notice that informs rather than confuses.

  Commenters also suggested customers will be confused by the contradictions between our notice requirements and FCC notice requirements. If companies send two different notices to customers under the opt-out mechanism, no doubt confusion will be the result. Confusion can be avoided if companies send customcrs only the correct notice based on these rules. Tu the extent our rules are more protective of sensitive call detail informadon than the FCC's rules, companies will be required to send opt-in notices. Following the rule that provides the greater privacy protection is not a confusing concept. *See WAC 480-120-209, 211, and 212.*

- **Informing Customers of Rights and Duties:** Companies commented that notice requirements that inform customers of their rights with respect to confidentiality of CPNI, and the requirement also to inform customers that companies have a duty to protect the confidentiality of

CPNI, ma): be confusing. No commenter explained just how this information may confuse customers, so lacking any specific concern, we reject the unsupported assertion. *See WAC 480-120-209(5)(c) and 480-120-212(3)(a) and (b).*

- **Required Use of 12-Point Type for Notices:** Our proposed rule requires the use of 12-point type in opt-our notices, and companies havc commented that it is unnecessary to stare the rcquircd size of type. Our experience is that many notices use type sizes rhat arc small and difficult to read. Prior to including the type size in the proposed rules, our staff produced a notice rhat contains all the rcquircd notice contents in twelve-point type. The sample notice fits on one side of a standard size sheet of paper. The example has standard margins and contains considerable separation between notice elements. No commenter stated thar the sample notice was deficient or for any reason could not be used. Because we have not been informed that there is a specific problem we have retained the requirement in the adopted rules. *See WAC 480-120-209(7).*

- **Notice That Not All Call Detail Will Be Used, Disclosed, or Accessed:** Another company comment is that limited notice is not permitted when limited use or disclosure of call detail is planned. There is nothing in the notice requirements for obtaining opt-in approval to use call detail that prevents a company from informing a customer of the limits to which call detail will be put to use. Because we require that notice be comprehensible and not misleading, companies must adhere to self-imposed limits. We were not asked to make a specific change, and we believe the rules permit companies to tailor notices to self-imposed limits on use, disclosure, and access, and therefore we make no change to the rules on this topic. *See WAC 480-120-209 and 212.*

- **Notice Concerning Entities to Which Call Detail May Be Disclosed:** Another suggestion in the comments is that it is unnecessary to provide the names of affiliates and subsidiaries in the opt-in notice because they are often unknown to customers who are accustomed to brand names. We think customers may be interested in the names of the firms that may receive call detail information, but nevertheless make a change in this subsection. After reflection, we think

disclosure of all affiliates, subsidiaries, and companies under common control would bc an impractical requirement to place on companics because they form an ever-changing group. We also think that companies, in order to convince customers to opt-in to the use of their most sensitive personal telecommunications information, will havc to find some level of revelation of who may receive the information that satisfies customers' curiosity about who will havc access to their information. Accordingly, we havc reduced the disclosure requirement to whether the information will be used, disclosed, or access permitted to an entity or pcrson other than rhc company. *See WAC 480-120-212(3)(d).*

- **Notice Concerning Availability of Name. Address. and Telephone Number to Telemarketers:** One commenter raised a concern that the notice requirements in the proposed rule concerning availability of name, address, and telephone number (subscriber list information) suggested companies must provide this information to all types of telemarketers. In the adopted rule we have made a change so that the notice must inform customers that name address and telephone number are not private information and may be used by telemarketers even if the customer opts-out. The revised notice requirement more correctly informs customers that choosing to opt-out is not the same as eliminating telemarketing. *See WAC 480-120-209(5)(a).*

- **Notice That No Action Is necessary to Protect Call Detail Disclosure to Third Parties: A** concern was expressed that this requirement could lead to confusion. We think it is imporrant for cusromers to know that they need not take any action to protect the most sensitive information (call detail) about them. No commenter suggested precisely how this would confuse customers, and we do not think it will. *See WAC 480-120-212(3)(f).*

- **Include A Copy of the Chart that Shows the Application of the Rules to Certain types of [illegible]:** In the proposed rules we included a chart labeled "Customer Approval Method Depends on the Type of Information." Consumer advocates suggested that a copy of this chart (which is revised in the adopted d e s) be required to be included with opt-out notices. Because the chart would not necessarily

be correct when a company chooses self-imposed limits on the use, disclosure, and access that it will permit and its notice reflects those self-imposed limits, we do not think we should require inclusion of the chart. Companies may find that inclusion of a chart is a good idea and may include a comprehensible and not misleading chart with a notice.

- **Some Notice Requirements Are Incompatible with Notice and Approval for the Duration of a Telemarketing Call**: Company criticism of the proposed rules is correct on this point. The adopted rules provide exemptions from the notice rule when the notice and approval extend only for the duration of a telemarketing call. *See WAC 480-120-213(2).*

- **Opt-out Approval Will Burden Consumer Organizations Rather Than Companies:** Consumer advocates suggested that the use of an opt-out approval mechanism for some information will burden consumer organizations that will be asked to assist customers in understanding their options, while companies **will** not bear this burden. In essence, this is another suggestion that customers will be easily confused and was presented as an argument for an all opt-in approach. We believe our notice requirements are sufficiently strong to require companies to send notices chat will inform rather than confuse, so we make no change in the adopted rules based on this comment. *See WAC 480-120-209 and 212.*

- **Rules Will Require Costly New Processes**: Companies commented that the administrative aspects of the new rule (notice and opt-out mechanisms) will increase costs for companies. This may be, but the purpose of these rules is to strike a balance between company concerns and customers' interests in privacy, speech, and association. There is a threshold of privacy protection below which we will not go, even if that protection means increased costs **will** result. With respect to imposing costs on customers or companies, these rules are not different from any other rules, any of which may cause an increase in cost to customers or to companies. *See WAC 480-120-209, 211, and 212.*

18 **Multiple Opt-out Mechanisms:** Companies commented in opposition to multiple opt-out mechanisms while consumer advocates commented in support

of the rules on this subject. Most comments in opposition state, in essence, that the multiple methods we require for exercising an opt-out opportunity are coo many and unnecessarily costly. Some commenters relied upon the FCC record to support the position that fewer methods are needed. We respond that our experience, borne out in our record, is different from the FCC's.

19 Our experience, and the record on which we act, demonstrate that multiple methods are needed to ensure ease of opting out. Many customers report that they attempted to opt-out in a situation in which a company sent an opt-out notice, but found they were thwarted in doing so when calls went unanswered and when they were told there was. no address to which a written opt-out directive could be sent. A particularly troublesome example of the difficulties cusromers encountered concerned a company that did not accept opt-out requests by telephone on Saturdays, but mailed notices that arrived on Saturdays. The same company did not accept opt-out calls in the evening, thwarring the efforts of those who open mail in the evening after work and would like to take immediate action to opr out.

20 As we discuss in the order, in one sense companies have an incentive to make it difficult for cusromers to opt-out. (In another sense, as Qwest learned, their long-term incentive is to maintain cordial relations uich their customers.) The order and this response discuss some of the problems. We have provided in this rule the methods that we consider appropriate to guard against these problems occurring again. While they may be multiple, their multiplicity does nor necessarily make them expensive. We decline to make changes based on the comments on this subject. *See WAC 480-120-211.*

21 **Optins–Out by Marking a Box or Blank on the Monthly Bill:** In some draft version of these rules we included marking a box or blank on the monthly bill as a means for a customer to opt-out. We did not include this as a method for opting out in our proposed rules because we were persuaded that it would be difficult to inform customers that they did not need to check the box every month and because we were persuaded by companies that it could interfere with bill processing, an important business function. In consumer comments on the proposed rules we were encouraged to once again include this option. We adhere to the position we took when we eliminated it from draft rules and excluded it from our proposed rules. *See WAC 480-120-211.*

22 **Limited Requirements for Companies With Fewer Than 50,000 Access Lines:** Comments from smaller companies suggest that it is inefficient to havc a 1-800 line with access to a live or automated operator at all times when it may only be called a few times per year. They do not recommend an alternative. This comment misreads the rule to mean that toll-free must be a 1-800 numbcr. Companies can meet this requirement by having a local telephone number for which a toll is not charged. If a message (voice, voicc activated, or touch-tunc) can be left by a caller when not answered, and if that opt-our request is confirmed as required by our rules, then a company will havc met the requirements of this rule. For those reasons, we decline to provide fewer opportunities for opting-out to customers of small companies as those of larger companies. A customer's interests in privacy, speech, and association arc not reduced by the size of the company providing telecommunications service. *See WAC 480-120-211.*

23 **The Opt-In Notice Should Not Require a Description of Each Purpose for Which Information May Be Used, Disclosed or Accessed:** We receive oral comments prior to publishing the proposed rules recommending that we not require a description in the notice of each purpose for which call d e t d mighr be used. The same comment was made in response to the proposed rule. Because it is not reasonable to expect every possible purpose to be listed, we have altered the adopted rules and now require thar opr-in notices provide a description of the general purposes for which the information may be used, disclosed, or for whch access may be permitted, *See WAC 480-120-212(3)(e).*

24 **written Confirmation:** We received company comments opposed to our requiremenr for written confirmation when a company receives a customer's opt-out or opt-in directive (other than a directive received during a telemarketing call). Our experience is chat companies cannot be depended on to follow the instructions accurately at all times. Our record includes statements from customers that their opt-out directives were not implemented. Accordingly, we think it is important that customers receive confirmation of their opt-out approval so errors can be detected before personal customer data is disclosed.

25 Written confirmation of opt-in approval is also important to prevent errors. The reason for confirmation of opt-in approval is that an error by a company in perceiving it has opt-in approval when it does not would expose customers'

most sensitive information (e.g., whom they call and who calls them) to, among other things, disclosure to third parties. We believe the confirmation requirement is an important safeguard, and our record supports this conclusion. *See WAC 480-120-213(1).*

26 **Oral Confirmation of Opt-Out or Opt-In Approval:** Companies commented that oral confirmation should bc permitted as well as written approval. No reason was given for this suggestion but we infer that it mighr bc less expensive and easier to provide oral confirmation. Because our confirmation requirement is aimed at detecting errors and providing customers an opportunity to correct them, we arc concerned that oral confirmation, cvcn with instructions about correcting an error, would be less effective than written confirmation. An automatically-dialed announcement that includes confirmation and instructions on what to do if the customers believes there has been an error places the burden on customers to be ready to receive the instructions and make notes at the company's convenience. A written confirmation provides a customer with information on how to correct an error without requiring the customer to attend to the circumstances immediately by taking notes. We believe written confirmarion assists customers and that oral confirmation would place a burden on customers Accordingly we make no change in the adopted rules on this subject. *See WAC 480-120-213.*

27 **Twenty-One Day Delay Before Acting on Opt-In Directives:** Company comments opposed the proposed rule's requirement that carriers must delay taking action approved by a customer's opt-in directive unul rwenry-one days after a confirmation has been sent to the customer. Wc have not changed the proposed rule.

28 In essence, commenters suggested that the waiting period required for acting on opt-in approval is unnecessary and that customers who opt-in often want the company to act immediately. The waiting period applies when the company wants to use, disclose, or permit access to call detail information (e.g., whom the customer calls and who calls the customer) unrelated to direct contact between the company and the customer through a telemarketing call. The purpose of the waiting period is to give the customer time to receive the confirmation of opt-in approval and, if an error has been made, time to contact the company and correct the error. Company concerns that they would not be able to respond to a customer's immediate need are not correct because an